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Volume 85 | Issue 3 Article 16

April 1983

Taxation

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Recommended Citation
Charles D. Dunbar, *Taxation*, 85 W. Va. L. Rev. (1983).
Available at: https://researchrepository.wvu.edu/wvlr/vol85/iss3/16

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TAXATION

I. Duty and Authority of the State Tax Commissioner

State ex rel. Rose v. Fewell, 294 S.E.2d 434 (W. Va. 1982)
Killen v. Logan County Commission, 295 S.E.2d 689 (W. Va. 1982)

In *State ex rel. Rose v. Fewell*[1] the West Virginia Supreme Court of Appeals recognized the duty and authority of the State Tax Commissioner to enforce compliance by county officials in the valuaton of property for tax purposes.

In *Fewell,* the State Tax Commissioner had attempted, without success, to have his new appraisals entered on the Putnam County land books. He then sought a writ of mandamus against the Putnam County Assessor and Commissioners, requesting that they either turn over the county property books to him for adjustment to the new property values, or to adjust the property books themselves.[2]

In granting the writ, the court noted the importance of the Tax Commissioner's appraisals in light of *Killen v. Logan County Commission*[3] decided on the same day as *Fewell.* If the "actual and true" value of property is to be taxed, the Tax Commissioner's appraisals take on increased importance. Under *Killen,* the Tax Commissioner sets the appraised values for taxation. County assessors have no discretionary powers of valuation and assessment and are left with only ministerial duties.[4] The *Fewell* court noted that the legislature empowered the Tax Commissioner to supervise tax assessors and county commissioners in the assessment and valuation of property.[5]

In addition to the writ of mandamus, another possible method of enforcement was noted by the court. The Tax Commissioner had issued a subpoena for the property books,[6] and he could have sought a writ of attachment enforcing the subpoena in the Circuit Court of Putnam County.[7]

In 1965, the court had denied a writ of mandamus to the State Tax Com-

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[1] 294 S.E.2d 434 (W. Va. 1982).

[2] *Id.* at 435.

[3] 295 S.E.2d 689 (W. Va. 1982). In *Killen,* the court held that the long-recognized practice of assessing property for taxes at between fifty and one hundred percent of its appraised value, as authorized by W. Va. Code § 18-9A-11 (Supp. 1981) was unconstitutional. The practice violated the constitutional requirement of "equal and uniform taxation." W. Va. Const. art. X, § 1.

Under the court's model, the increased assessments could be offset by a reduction in tax rates charged by the local governments. *Killen,* 295 S.E.2d at 707-08. However, public fear of higher taxes produced an amendment to the West Virginia Constitution which limits the assessment of property. Thus, the passage of the amendment by the West Virginia voters on November 2, 1982, nullified the effect of the *Killen* decision as it relates to assessed property values.

[4] *Killen,* 295 S.E.2d at 708.

[5] *Fewell,* 294 S.E.2d at 437-38. In support of the legislative grant of power, the court cited W. Va. Code §§ 6-9-1 (1979), 11-1-2 (1974), 11-3-1 (Supp. 1982), 11-3-24 (Supp. 1982), and 18-9A-11(g) (Supp. 1982).

[6] The subpoena *duces tecum* was issued under W. Va. Code § 6-9-7 (Supp. 1982).

[7] *Fewell,* 294 S.E.2d at 438.

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missioner under circumstances similar to *Fewell.*[8] That decision was overruled in *Pauley v. Kelly,*[9] where the court held that the Tax Commissioner had the authority to enforce his duties. The *Fewell* court went a step further by allowing a writ of mandamus and noting an alternative form of enforcement.

II. Notice to Delinquent Taxpayers

Don S. Co. v. Roach, 285 S.E.2d 491 (W. Va. 1981)

In *Don S. Co. v. Roach,*[10] the court outlined what notice is necessary to a delinquent taxpayer whose property is to be sold for nonpayment of taxes.

The taxpayers claimed that they were not adequately notified of their delinquent tax status and of the subsequent sale of their land for nonpayment of taxes. At that time, West Virginia Code § 11A-3-2 required notice by publication in a local newspaper.[11]

The court, in an opinion by Justice McGraw, determined that the taxpayers had not received actual notice, and the trial record showed no publication of notice. Therefore, the court reasoned, the taxpayers were denied due process, and the tax deed was void.[12] The court listed the taxpayer's illiteracy and low educational level as mitigating factors which "must be considered in a case such as this. . . ."[13]

The court did not explain how illiteracy fits into the scheme of due process; nor did the court give practical guidelines, such as the degree of illiteracy required for special treatment.

As the court noted, notice requirements to delinquent taxpayers have changed since the amendment of West Virginia Code § 11A-1-8,[14] requiring actual notice. The court also gave a helpful outline of what actual notice should include.[15]

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[8] State *ex rel.* Rease v. Battle, 149 W. Va. 761, 143 S.E.2d 328 (1965), *overruled,* 255 S.E.2d 859 (W. Va. 1979).

[9] 255 S.E.2d 859, 881-82 (W. Va. 1979).

[10] 285 S.E.2d 491 (W. Va. 1981).

[11] W. Va. Code § 11A-3-2 (1974).

[12] *Don S. Co.,* 285 S.E.2d at 495-96. The opinion did not state whether or not notice by publication was given.

[13] *Id.* at 496.

[14] W. Va. Code § 11A-1-8 (Supp. 1982).

[15] The notice should show what taxes are due, and how payment might be made. Also, the notice should include:

> . . . a statement that the failure to pay real property taxes could result in sale of the real property by the State, and that if the land is not redeemed by the payment of delinquent taxes within eighteen months of the sale, the landowner risks the loss of all claim to title.

Don S. Co., 285 S.E.2d at 496.

III. Municipal Taxes

Ellison v. City of Parkersburg, 284 S.E.2d 903 (W. Va. 1981)

The court approved the City of Parkersburg's method of financing garbage collection in *Ellison v. City of Parkersburg.*[16] In *Ellison,* Parkersburg taxed owners of real property to finance the city's garbage collection. The city reasoned that owners of real property either used that property or rented it to others.

If the owners used their property, they were the proper parties to bill for garbage services. The owners who rented their property had two options. The city, with notice from the property owners, would bill the tenant, or the owner could pay the tax and pass the cost to the tenant in the form of higher rent.[17] Hence, the ultimate user paid for the garbage collection.

In an opinion by Justice McHugh, the court agreed with this logic and found the plan to be within the confines of a city's statutory authority.[18]

IV. Business and Occupation Tax

Capitol Cablevision Corp. v. Hardesty, 285 S.E.2d 412 (W. Va. 1981)

In *Capitol Cablevision Corp. v. Hardesty*[19] the court ruled that local television cable companies must pay business and occupation taxes on local revenues, even though the companies' function could be considered interstate in nature.

Capitol Cablevision argued that it should not be taxed for two reasons. First, by receiving out-of-state television broadcasts and transmitting them into homes, the company was involved in interstate commerce. Therefore, taxation of its gross revenues by West Virginia violated the equal protection guarantees of the United States Constitution.[20] Next, Capitol Cablevision claimed that its activities, including placing its own programming on a channel to cable subscribers, constituted "broadcasting," which was exempt from business and occupation taxes in West Virginia.[21]

The court, in an opinion by Justice McGraw, found neither argument persuasive. The mere fact that a business was involved in interstate commerce did not preclude state taxation. Since Capitol Cablevision's revenues came from purely local sources (cable subscribers in the Charleston area), the revenues were taxable by West Virginia.[22] However, only the in-state portion of revenues were taxable.[23]

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[16] 284 S.E.2d 903 (W. Va. 1981).

[17] *Id.* at 906.

[18] *See* W. Va. Code § 8-13-13 (1976).

[19] 285 S.E.2d 412 (W. Va. 1981).

[20] U.S. Const. amend. XIV, § 1.

[21] W. Va. Code § 11-13-3(g) (1978).

[22] The court cited Fisher's Blend Station, Inc., v. Comm'r, 297 U.S. 650 (1936) as support for its position.

[23] 285 S.E.2d at 416 (citing Western Livestock v. Bureau of Revenue, 303 U.S. 250 (1938)).

The court also found that Capitol Cablevision was not within the "broadcasting" exemption to business and occupation taxes.[24] Television cable companies, to the court, were more like common carriers than broadcasters. Even though Capitol Cablevision sent its own programming to subscribers, its activities essentially amounted to a "delivery service" of signals to local subscribers.[25]

Since cable television companies are unique in nature, this decision will have limited applicability to other business and occupation tax cases. However, the principle of taxing local revenues of businesses engaged in interstate commerce appears well settled and is applicable to a wide variety of business settings.[26]

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[24] W. VA. CODE § 11-13-3(g) (Supp. 1982).

[25] 285 S.E.2d at 420.

[26] *See* Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977), *cited in Capitol Cablevision*, 285 S.E.2d at 417-18.